SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 75-57

SAMUEL F. MANARITE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OSCAR B. GOODMAN, ESQ.
HOWARD M. MILLER, ESQ.
Goodman and Snyder
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorneys for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	
I. THE DECISIONS OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE DUE PROCESS PRINCIPLES ENUNCIATED BY THIS COURT IN *GIGLIO V. UNITED STATES.*	8
II. A SENTENCE AND JUDGMENT IMPOSING A PERIOD OF IMPRISONMENT AND A FINE IS CONSTITUTIONALLY IMPERMISSIBLE.	10
CONCLUSION	13
APPENDIX	12

TABLE OF AUTHORITIES

Cases:

Brady v. Maryland, 373 U.S. 87 (1963)	8
Giglio v. United States, 405 U.S. 150 (1972)	8,9
Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966)	12
Johnson v. Avery, 393 U.S. 484, 488-90 (1969)	12
Mooney v. Holohan, 294 U.S. 103 (1935)	8
Napue v. Illinois, 360 U.S. 264 (1959)	8
Shapiro v. Thompson, 394 U.S. 618, 637 (1969)	12

Page

Simpson v. Teets, 353 U.S. 926 10

Smith v. United States, 259 F.2d 125 (1958) 10

Tate v. Short, 401 U.S. 395 (1971) 11

Williams v. Illinois, 399 U.S. 235 (1970) 10, 11

Statutes:

Constitution of the United States

Amendment V 3

Amendment XIV 4

18 U.S.C. § 2 4

18 U.S.C. § 894 4

18 U.S.C. § 2255 ..... 2, 6, 7, 9

28 U.S.C. § 1254(1) 2

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, SAMUEL F. MANARITE, prays that a Writ of Certiorari issue to review the judgment entered on May 15, 1975, by the United States Court of Appeals for the Second Circuit in the proceeding entitled Samuel F. Manarite, Petitioner-Appellant vs. United States of America, Respondent-Appellee, Docket No. 75-2013.

OPINIONS BELOW

The judgment of the District Court was affirmed by the Court of Appeals for the Second Circuit without opinion. The judgment of the Court of Appeals appears in the Appendix hereto at Page A 1; the judgment of the United States District Court appears in the Appendix hereto at Page A 2.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1975. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether an evidentiary hearing is required to resolve Petitioner's averment of prosecutorial suppression of material exculpatory evidence?

2. Whether a sentence and judgment imposing a period of imprisonment and a fine, qualified by an order of conditional commitment until such fine is paid, is impermissible under the Fifth and Fourteenth Amendments to the United States Constitution?

STATUTORY PROVISIONS

18 U.S.C. §2255. *Federal custody; remedies on motion attacking sentence.*

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. ***

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V

No person shall. . .be deprived of life, liberty, or property, without due process of law. . .

Constitution of the United States, Amendment XIV

. . .No state shall. . .deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, SAMUEL F. MANARITE, was convicted in the United States District Court for the Southern District of New York of violation of Title 18, United States Code, Sections 894 and 2. The Petitioner appealed that judgment of conviction in the United States Court of Appeals for the Second Circuit wherein that conviction was affirmed. Review by petition for certiorari was sought and denied. Subsequent to that decision, Petitioner filed a motion to vacate judgment based on newly discovered evidence and asserted constitutional infirmities in the judgment as imposed. The District Court denied Petitioner's motion without having conducted a hearing thereon and this order was affirmed by the Court of Appeals. The facts which underlie the questions herein presented relate both to certain promises made to the Government's chief witness, the existence of which were discovered subsequent to the time Petitioner first sought review of the conviction, as well as the language and terms of the judgment and sentence imposed by the District Court.

The chief prosecution witness, PHIL FRIMET, on whose testimony the case rested, testified that he had no agreement whatsoever with the Government for consideration in the disposition of the witness' pending State and Federal criminal charges in exchange for his testimony against Petitioner. FRIMET went so far as to

state unequivocally that he had never even asked for assistance from Government police or prosecutorial agencies, though prior to testifying he had many conversations with representatives of both such agencies; and that he had no expectations of intervention on his behalf by the Government (A.20a-29a)*. FRIMET'S counsel on his pending criminal charges also testified, flatly denying the existence of any agreement between FRIMET and the Government. The prosecuting United States attorney represented that he had unilaterally undertaken to communicate the fact of FRIMET'S cooperation to the sentencing judge in only one of FRIMET'S pending state charges, but that this undertaking had not been communicated to FRIMET or his attorney (A.32a-34a). Thus, the trial court concluded that the Government's proposed efforts in FRIMET'S behalf, having been communicated neither to FRIMET, nor his counsel, were irrelevant to the trial of Petitioner (A.37a).

The resulting effect of excluding the testimony regarding any agreements between FRIMET and the Government was to lead the jury to the belief that the chief prosecution witness was testifying without bias or motive to fabricate in a situation where the question of his credibility was of ultimate importance.

Following conviction of the charges, Petitioner was sentenced as follows:

> IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of

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*"A. . .a" refers to the Appendix in the United States Court of Appeals for the Second Circuit, Docket No. 75-2013.

> FIFTEEN (15) YEARS and fined $5,000.00. The defendant is to staad committed until the fine is paid or he is otherwise discharged according to law. A 8

Approximately three and one half years after the sentence was imposed, Petitioner made payment of the $5,000.00 fine.

The evidence on which the Petitioner relied in his motion to vacate the sentence and for a hearing on the motion under Title 28, United States Code, Section 2255, consisted of an affidavit by Petitioner's wife which was supported by a transcript of a telephone conversation. Petitioner's supporting affidavit was contradicted by counter affidavits submitted in opposition by the Government. The affect of the above affidavits was to put at issue the existence and knowledge of any agreements between FRIMET and the Government at the time FRIMET testified. The District Court denied the motion without conducting an evidentiary hearing A 2.

The Court of Appeals, in affirming the judgment of the District Court, considered also the transcribed statements of United States Attorney, JOEL FRIEDMAN, in FRIMET'S behalf at a sentencing proceeding in United States District Court for the Southern District of New York:

> Your Honor, before this witness testified in any manner it was explained to him that the Government could make no promises to him, and that all we could do was that if he cooperated by telling the truth, present the extent to which he cooperated to the Court at the time of his sentencing. Given that fact. . .that there was absolutely no guarantees, Mr. FRIMET has gone on and testified in two major Government cases.

> The first case was United States vs. Manarite and Portelo. . .in which Mr. FRIMET was the principle witness. . .A.46a.

These representations clearly and unambiguously establish prior knowledge by FRIMET of the extent to which the Government would assist him in exchange for his testimony against Petitioner, and contradict the representations made in the course of the trial by both FRIMET and the prosecuting United States attorney.

Notwithstanding the above, the Court of Appeals upheld the District Court's denial of the motion to vacate judgment without having conducted an evidentiary hearing as required by Title 18, United States Code, Section 2255.

The questions presented in both the District Court and the Court of Appeals were, thus, twofold: Whether the prosecution had suppressed material exculpatory evidence in the trial of the case; and whether the sentence and judgment, as imposed, was within the permissible bounds of the due process and equal protection guarantees of the United States Constitution?

REASONS FOR GRANTING THE WRIT

I.

THE DECISIONS OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE DUE PROCESS PRINCIPLES ENUNCIATED BY THIS COURT IN *GIGLIO V. UNITED STATES*.

This Petition presents a significant question concerning the application of the principle of *Giglio v. United States*, 405 U.S. 150 (1972) in federal criminal prosecutions.

In *Mooney v. Holohan*, 294 U.S. 103 (1935) this Court held the deliberate suppression of material, exculpatory evidence by the prosecution in the trial of a criminal case to be violative of due process of law. That "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears" was established in *Napue v. Illinois*, 360 U.S. 264 at p.269 (1959). "A new trial is required if the false testimony could. . .in any reasonable likelihood have affected the judgment of the jury. . .." Id., 360 U.S. at p.271. Further, the suppression of material evidence justifies a new trial irrespective of good faith or bad faith on the part of the prosecution, *Brady v. Maryland*, 373 U.S. 87 (1963).

More recently, this Court has held that the suppression of material, exculpatory evidence going only to the issue of credibility, even where the evidence concerned an agreement between the witness and a Government prosecutor other than the one prosecuting

the case and without his knowledge, was violative of due process of law, *Giglio v. United States*, 405 U.S. 150 (1972). The Court recognized that ". . .the Government's case depended almost entirely on [the witness'] testimony; without it there could have been no indictment and no evidence to carry the case to the jury. [His] credibility as a witness was an important issue in the case and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." Id., 405 U.S. at p.154. Such an agreement is discernible where the witness whose credibility is in issue testifies in reliance on "the good judgment and conscience of the Government. . ." Id., 405 U.S. at 153. Moreover, where "[the representation of the prosecutor], standing alone, contains at least an implication that the Government would reward the cooperation of the witness and hence tends to confirm rather than refute the existence of some understanding for leniency. . .," disclosure of such information to the jury is required. Id., 405 U.S. at p.153, n.4.

The decision below casts a pall of uncertainty as to the continued vitality of the principles of *Giglio* and its predecessors by upholding the denial of Petitioner's motion without an evidentiary hearing having been conducted. Where, as here, the averment of suppression of material, exculpatory evidence was put at issue by conflicting affidavits, the express language of Title 28, United States Code, Section 2255 that the Court "shall grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto" would appear to mandate the conducting of an evidentiary hearing.

The decision of the United States Court of Appeals for the Ninth Circuit in *Smith v. United States*, 259 F.2d 125 (1958), citing *Simpson v. Teets* 353 U.S. 926, is in accord with the view that an allegation of prosecutorial suppression of material, exculpatory evidence, made pursuant to Title 18, United States Code, Section 2255, requires the conducting of a hearing, even where the allegations are "...brief and lack[ing in] particularity". *Smith, supra*, 259 F.2d at p.127.

In the case at bar it is undisputed that the conviction rested entirely on the testimony, and necessarily the credibility of one witness. Further, it would appear that there was some understanding, some consideration, between the witness and the Government which was kept from the jury – the transcribed statement of the United States attorney contains at least an implication that the witness was aware and had expectations, of some reward for his cooperation. In this context, it is submitted that the Court Below erred in denying Petitioner, minimally, an evidentiary hearing to resolve the allegation of prosecutorial suppression of material, exculpatory evidence.

II.

A SENTENCE AND JUDGMENT IMPOSING A PERIOD OF IMPRISONMENT AND A FINE IS CONSTITUTIONALLY IMPERMISSIBLE.

This Petition presents a significant question concerning the application of the principle of *Williams v. Illinois*, 399 U.S. 235 (1970).

Petitioner was sentenced to a period of imprisonment, fined, and ordered to "stand committed until the fine is paid." It is respectfully submitted that this judgment and sentence, on its face, is violative of equal protection of law.

In *Williams v. Illinois, supra*, this Court held the jailing of an indigent defendant in lieu of a fine to be violative of equal protection of law. The Court stated that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." Id, 399 U.S. at p.244. Further, "[b]y making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment." Id.

To permit the imposition of a fine where, as here, the punishment can only apply to one category of persons, non-indigents, would seem to violate the equal protection proscription of *Williams*. If maximum *confinement* cannot be based upon ability to pay under the Equal Protection Clause, it would seem a necessary corollary that maximum *punishment* cannot similarly be based on ability to pay. The parity of treatment between indigents and non-indigents required by *Williams* and *Tate v. Short*, 401 U.S. 395 (1971), suggest that the imposition of a fine as a mode of punishing those convicted of criminal acts is impermissible under the Constitution.

Of the three basic modes of punishment for conviction of a crime, probation, imprisonment and fine, only the latter is necessarily based on distinctions of wealth. Since indigents cannot be subjected to increased incarceration because of their inability to pay fines, the only alternative which places non-indigents on a parity with indigents is to eliminate the fine as a constitutionally permissible manner of punishment. This is necessarily so because only non-indigents can be subjected to a penalty beyond the maximum term of imprisonment allowed by law — that of a fine. Requiring the State to pursue reasonable alternatives to procedures resulting in disparate treatment is wholly consistent with the long line of decisions of this Court holding "[l]ines drawn to the basis of wealth or property, like those of race. . . traditionally disfavored." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966). Moreover, requiring the State to pursue reasonable alternatives to the discriminatory imposition of a fine is also consistent with the historical protection this Court has given to the infringement of constitutional interests by requiring statutes to be drawn as narrowly as possible, even where the purposes of the State are legitimate and substantial. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969); *Johnson v. Avery*, 393 U.S. 484, 488-90 (1969).

CONCLUSION

For the above reasons a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully Submitted:

OSCAR B. GOODMAN, ESQ.
HOWARD M. MILLER, ESQ.
Goodman and Snyder
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101

Counsel for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit was mailed this _____ day of July, 1975, postage prepaid, to the Honorable Robert Bork, Solicitor General, United States Department of Justice, Washington, D.C. 20530.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of May one thousand nine hundred and seventy five.

Present: Hon. J. Joseph Smith
Hon. James L. Oakes
Circuit Judges
Hon. William J. Jameson
District Judge

Samuel F. Manarite,
Petitioner-Appellant,
v.

75-2013

United States of America,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk
By VINCENT A. CARLIN,
Chief Deputy Clerk

E.P. CR 10 MEMO 536

(seal)

U.S. DISTRICT COURT
Filed
NOV 8 1974
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

SAMUEL F. MANARITE,
Petitioner,

74 Civ. 2747
E.L.P.

-against-
UNITED STATES OF AMERICA,
Respondent.

----------x

PALMIERI, J.

This is a motion to vacate sentence pursuant to 28 U.S.C. § 2255.

In 1969 Samuel F. Manarite and Richard J. Portela were indicted for using extortionate means to collect or attempt to collect an extension of credit in violation of 18 U.S.C. §§ 894 and 2. Upon trial the jury found Manarite guilty and acquitted Portela. Manarite's conviction was subsequently affirmed by the United

States Court of Appeals for the Second Circuit, *United States v. Manarite*, 434 F.2d 1069 (1970), and the United States Supreme Court denied certiorari, *Manarite v. United States*, 402 U.S. 972 (1971).

Petitioner's Challenge to the Constitutionality of Committed Fines is Without Basis in Law.

On July 16, 1970, the following sentence was imposed upon petitioner:

> "It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of FIFTEEN (15) YEARS and FINED $5,000.00. The defendant is to stand committed until the fine is paid or he is otherwise discharged according to law." *United States of America v. Manarite*, 69 Cr. 892, Judgment.

Petitioner now claims that this sentence is "illegal and void in that it amounts to a judgment requiring him to be incarcerated until a fine is paid, and such sentence is void under the Constitution of the United States. *Williams v. Illinois*, 399 U.S. 235 (1970); *Morris v. Schoonfield*, 399 U.S. 508 (1970); *Tate v. Short*, 401 U.S. 395 (1971), and their progeny."

Petitioner's reliance on *Williams* in his attack on committed fines is wholly misplaced. *Williams* protects the indigent defendant from being continued in confinement because of "an *involuntary* nonpayment of a fine . . . ", 399 U.S. at 241, emphasis added. It is not an escape hatch for those who can afford to pay their fines. The imposition of a committed fine becomes

offensive under *Williams* if, at the end of his sentence, the indigent defendant is denied release because penury precludes his paying it. Not only is petitioner not an indigent, as his petition admits, but he has paid his fine in full. *Williams* is therefore completely inapplicable to his case. In any event, even if petitioner were indigent, his claims would be premature. Unless he can demonstrate that his sentence has been increased because of nonpayment of his fine, he lacks standing to assert a deprivation of his rights. See *Tileston v. Ullman*, 318 U.S. 44 (1943).

Petitioner's citation of *Tate* is equally inapposite. The Court there stated unequivocally, "[w]e emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so." 401 U.S. at 400.

Petitioner also asserts that as the judgment of the court states that the petitioner is to stand committed until he pays the fine, "by implication, upon payment of the fine, Petitioner should have been released from confinement under this sentence." Petitioner's committed fine was a penalty separate and apart from his prison term. This assertion is a mere conjuring with words.

Petitioner's Claim of Prejudice Owing to an Undisclosed Agreement Between Government Counsel and Counsel for the Prosecution's Chief Witness is Without Basis in Fact.

Petitioner bases a second claim for vacating of his sentence on an allegation of undisclosed promises

between government counsel and counsel for its chief witness, in violation of *Giglio v. United States*, 405 U.S. 150 (1972). The claim is false and unrelated to this case. Petitioner relies upon a telephone conversation between his wife and counsel for the prosecution witness, which petitioner's wife taped without the knowledge or consent of the attorney, wherein the attorney acknowledged that the Government had recommended a suspended sentence for his client on charges pending in a New York State Court.[1] Nowhere

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[1] The conversation is between the attorney for prosecution witness Phillip Frimet, and Jeanne Manarite, wife of the petitioner. The pertinent part of the transcript and the part emphasized by Petitioner reads as follows:

ATTORNEY: THEY RECOMMENDED THAT IS ALL THEY DID FOR ME.

JEANNE: THEY WHAT?

ATTORNEY: THEY WENT TO THE JUDGE AND RECOMMENDED A SUSPENDED SENTENCE.

JEANNE: THEY DID RECOMMEND A SUSPENDED SENTENCE, RIGHT? DID THEY?

ATTORNEY: THEY DID.

JEANNE: THEY RECOMMENDED A SUSPENDED SENTENCE AND YOU TOLD ME UP TO THIS POINT THEY NEVER DID.

ATTORNEY: THEY RECOMMENDED IT IN THE STATE COURT.

JEANNE: YOU SAID THEY ONLY SAID BE NICE TO HIM, THEY DIDN'T RECOMMEND ANYTHING.

ATTORNEY: THEY DIDN'T RECOMMEND IT IN THE FEDERAL COURT ONLY IN THE STATE COURT.

JEANNE: THEY STILL RECOMMENDED IT THOUGH.

ATTORNEY: IN THE STATE COURT."

in this conversation is there any reference to the time at which government counsel offered to make this recommendation.

The sentence which petitioner here seeks to vacate was imposed in 69 Cr. 892, a case tried in May, 1970. In October, 1970, petitioner's case 69 Cr. 747, a completely separate charge, came before another judge of this court. It was in connection with the latter case, and well after petitioner was sentenced in 69 Cr. 892, that a promise of help on the state charges was made to witness's counsel in exchange for his client's co-operation.[2] The trial minutes record that this promise was brought out fully in open court, see *United States of America v. Manarite, et al.*, 69 Cr. 747, Stenographer's Minutes, October 6, 7, 1970, at 104-105.

Petitioner's claims are without basis in law or fact, and the motion is denied. It is so ordered.

Dated: New York, N.Y.
November 8, 1974

EDMUND L. PALMIERI
U.S.D.J.

EDMUND L. PALMIERI
U. S. D. J.

[2] The affidavit of the attorney for prosecution witness Phillip Frimet in 69 Cr. 892 and 69 Cr. 747, dated June 27, 1974, states the following:

> "6. About six months after the conviction of SAMUEL F. MANARITE, in connection with another case, *United States of America v. MANARITE* [69 Cr. 747] unrelated to 69 Cr. 892, Government prosecutors promised to send a letter to the sentencing judge in the State Court making known the extent of Frimet's cooperation if Frimet testified on behalf of the Government. Frimet did so testify and such a letter was ultimately sent."

JUDGMENT AND COMMITMENT (Rev. 2-68) Cr. Form No. 25

DOCKETED AS
JUDGMENT #70,868
July 20, 1970

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

U. S. DISTRICT COURT

FILED

JUL 16 1970

S. D. OF N. Y.

United States of America

v.

No. 69 Cr 892 ELP

SAMUEL F. MANARITE

On this 16th day of July, 1970 came the attorney for the government and the defendant appeared in person and[1] by counsel

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty, and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly using express and implicit threats of violence and other criminal means to cause harm to the person, reputation and property of a debtor, in order to collect and attempt to collect an extension of credit from the said debtor. (Title 18, United States Code, Sections 894 and 2)

as charged[3]

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] FIFTEEN (15) YEARS and FINED $5,000.00. The defendant is to stand committed until the fine is paid or he is otherwise discharged according to law.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United

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[1] Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further

States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Illegible
United States District Judge.
/s/ John Livingston,
Clerk.

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imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court to recommend a particular institution.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-57

SAMUEL F. MANARITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court's imposition of a fine following his conviction denied him equal protection, and that the district court's refusal to conduct an evidentiary hearing to determine whether the government suppressed exculpatory evidence as alleged in petitioner's Section 2255 motion denied him due process.

On May 21, 1970, after a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of using extortionate means to collect an extension of credit, in violation of 18 U.S.C. 894 and 2. He was sentenced to a term of 15 years' imprisonment and fined $5,000. The court of appeals affirmed. *United States* v. *Manarite*, 434 F.2d 1069 (C.A. 2), certiorari denied, 402 U.S. 972. Subsequently, on October 28, 1970, after another jury trial in the United States District Court for the

Southern District of New York, petitioner was convicted of conspiring to transport obscene material, in violation of 18 U.S.C. 371 and 1465. He was sentenced to a term of 18 months' imprisonment, the sentence to run consecutively to that imposed on his extortion conviction, and fined $5,000. The court of appeals affirmed. *United States* v. *Manarite*, 448 F.2d 583 (C.A. 2), certiorari denied, 404 U.S. 947. On June 25, 1974, petitioner filed the instant motion to vacate judgment and sentence in his extortion conviction, pursuant to 28 U.S.C. 2255. The United States District Court for the Southern District of New York denied the motion without a hearing (Pet. App. 3a-7a), and the court of appeals affirmed without opinion (Pet. App. 1a).

1. Petitioner contends that the $5,000 fine imposed by the district court following his extortion conviction denied him equal protection because it discriminated against him, a non-indigent defendant. Following his extortion conviction, the district court ordered (Pet. App. 9a) "that the defendant [be] committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN (15) YEARS and FINED $5,000.00. The defendant is to stand committed until the fine is paid or he is otherwise discharged according to law." On December 18, 1973, petitioner paid the fine.

Although an indigent prisoner may not be incarcerated beyond the maximum term prescribed by statute because of his involuntary nonpayment of a fine, it is well established that where, as here, a convicted defendant has the means to pay a fine, he may be imprisoned for his refusal or neglect to do so. *Tate* v. *Short*, 401 U.S. 395, 400; *Williams* v. *Illinois*, 399 U.S. 235, 242, n. 19.[1] Petitioner was sentenced under a statute permitting punishment by both

[1]Contrary to petitioner's further contention, this does not amount to inverse discrimination against non-indigents, since "[t]he State is not powerless to enforce judgments against those financially unable to pay a fine * * *" by alternative means. *Tate* v. *Short, supra*, 401 U.S. at 399, quoting *Williams v. Illinois, supra*, 399 U.S. at 244.

fine and imprisonment; it is clear that his sentence was not "parlayed into a longer term of imprisonment than is fixed by the statute." *Williams* v. *Illinois, supra*, 399 U.S. at 243.[2]

2. Petitioner further contends that the district court erred in denying his motion under 28 U.S.C. 2255 without a hearing. Such a hearing is not required, however, where, as here, the files and record of the case "conclusively show" that the petitioner is not entitled to any relief. 28 U.S.C. 2255. See, *e.g., Moran* v. *Hogan*, 494 F.2d 1220, 1222 (C.A. 1); *Chapman* v. *United States*, 472 F.2d 117, 118 (C.A. 5), certiorari denied, 411 U.S. 970.

In his motion to vacate sentence, petitioner alleged "that counsel for the Government and counsel [Victor Roberts] for the chief prosecution witness [Phil Frimet] in fact had an agreement to the effect that Government counsel would recommend a suspended sentence for the witness in a case then pending before a State Court in exchange for his testimony and cooperation in the instant case [the extortion charge]" and that that agreement was carried out but was effectively concealed at trial[3] (Motion to Vacate Sentence, p. 3, June 25, 1974). In support of his motion, petitioner submitted an affidavit in which his wife averred that Victor Roberts had told her of an agreement that he and the federal prosecutors had reached concerning a

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[2]18 U.S.C. 892 provides for a fine of not more than $10,000 or imprisonment for not more than 20 years, or both.

Additionally, in view of petitioner's payment of the committed fine and his inability to demonstrate that his period of imprisonment was (or would be) lengthened as a result of the fine, petitioner appears to lack standing to raise this claim insofar as it rests on possible extension of the term of imprisonment. See *Tileston* v. *Ullman*, 318 U.S. 44.

[3]At petitioner's trial on the extortion charge Frimet, who was awaiting sentencing on a state pornography charge, testified that he was told by federal officers not to expect favorable consideration for his prospective testimony against petitioner (Tr. 106-108). Frimet's attorney, Victor Roberts, corroborated this testimony, stating that no agreement had been made to procure Frimet's testimony (Tr. 141-143). The government attorney advised the court that he had conferred with the state prosecutor and decided to write a letter to the state sentencing court concerning Frimet's cooperation in the extortion prosecution; however, this decision had not been communicated to Frimet (Tr. 150).

sentence recommendation for Frimet in return for his testimony against petitioner.[4]

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[4]Petitioner supplemented this affidavit with the transcript of a telephone conversation between his wife and Roberts (Brief in Support of Motion to Vacate, Exh. A, pp. 3-4):

> Roberts: They went to the judge and recommended a suspended sentence.
>
> Jeanne [petitioner's wife]: They did recommend a suspended sentence, right? Did they?
>
> Roberts: They did.
>
> Jeanne: They recommended a suspended sentence and you told me up to this point they never did.
>
> Roberts: They recommended it in the state court.
>
> Jeanne: You said they only said be nice to him, they didn't recommend anything.
>
> Roberts: They didn't recommend it in the federal court only in the state court.
>
> Jeanne: They still recommended it though.
>
> * * * * *
>
> Jeanne: Didn't he tell this to Phil [Frimet] before he was giving him all?
>
> Roberts: He never said a word. Whatever Friedman had was with me.
>
> Jeanne: And you never told your client.
>
> Roberts: He refused. He never told my client.
>
> Jeanne: You never told your client.
>
> Roberts: How am I going to tell him. I have to wait to see what the outcome is before I can tell him anything. I can't tell him if I'm not sure. I'm not going to say to a man your [*sic*] going to be given a suspended sentence when [I'm] not sure, its up to the Judge. I never tell my clients this is what I am going to do for you.

In response, the government submitted the affidavits of Roberts and of Jerome Merin, a Department of Justice attorney familiar with petitioner's prosecution. In his affidavit, Roberts denied making the remarks to petitioner's wife that were contained in her affidavit concerning promises by government attorneys, and stated that he had repeatedly rejected her numerous requests to provide an affidavit that would substantiate the representations made in her affidavit. He further stated that at no time during the extortion proceedings did anyone in or associated with the United States Government make any promises to Frimet, and that the only promise made to Frimet was in connection with his cooperation in the proceedings leading to petitioner's subsequent conviction for transporting obscene materials (Affidavit, June 27, 1974). In his affidavit Merin confirmed that "[n]o promises were made to Phil Frimet or his attorney [Roberts] with regard to [the extortion] Indictment" and that a "letter to the District Attorney of Kings County [New York] was promised well after the [extortion] trial * * * and was written with regard to Mr. Frimet's testimony in 69 Cr. 747, a pornography trial * * *" (Affidavit, June 28, 1974).

On their face, the facts alleged by petitioner were therefore insufficient to warrant either a hearing or relief. Even if the factual representations contained in his wife's affidavit were true, they would not establish an agreement between the federal government and Frimet's attorney to secure Frimet's testimony against petitioner at petitioner's extortion trial. Neither in her affidavit nor in the transcript of her telephone conversation with Roberts was there reference to the time at which the government offered to make the sentencing recommendation or to the particular prosecution of petitioner in regard to which the recommendation was made (Pet. App. 6a-7a). Her affidavit and the transcript of the telephone conversation were there-

fore entirely consistent with the affidavits of Roberts and Merin, who had personal knowledge of the sentencing recommendation agreement, and whose affidavits conclusively showed that the promises made to Frimet, about which petitioner complained, were made in connection with a proceeding that occurred after petitioner's extortion conviction. Cf. *Dalli* v. *United States*, 491 F.2d 758, 762, n. 4 (C.A. 2); *Harris* v. *United States*, 436 F.2d 591. 594-595 (C.A. 10). In any event, the affidavit in support of petitioner's application contained "[m]ere generalities [and] hearsay statements" that were insufficient to entitle petitioner to relief. *Dalli* v. *United States, supra,* 491 F.2d at 760.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.